IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM A. D. 1942

No. 26

HENRY ANTON PFISTER,

Petitioner,

vs.

NORTHERN ILLINOIS FINANCE CORPORATION, ALGONQUIN STATE BANK, HARTMAN AND SON, ET AL.,

Respondents.

No. 27

HENRY ANTON PFISTER,

Petitioner,

vs.

NORTHERN ILLINOIS FINANCE CORPORATION, ALGONQUIN STATE BANK, HARTMAN AND SON, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' BRIEF.

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FOREWORD.

It is the opinion of the Respondents that the petitioner does not fully and completely conform to the rules of the Supreme Court in the compilation of his brief.

The petitioner's brief has failed to organize the identical or similar topics under one heading and repetitiously refers to them in all parts of the brief. His lack of systematic tabulation of points has made respondents' brief difficult to organize.

For the sake of facilitating reference from one brief to another, we have maintained the same lack of organization and followed the same order as his brief and the points therein discussed.

I.

The Report of the Opinion Below.

The opinion of the Appellate Court below is reported as *Pfister* v. *Northern Illinois Finance Corporation,* CCA 7, 123 Fed. (2d) 523, decided November 10, 1941. R. 209 to 215.

The District Court below issued no opinion. The two final orders of the District Court are found at R. 173 to 178.

II.

Concise Statement of Facts.

The petitioner has sought in his concise statement of the case and the questions presented to confuse the material issues in this case by inserting immaterial matters into his statement of facts and arguments in his brief not borne out by the record, and which we deem have been placed in his brief for the sole purpose of prejudicing the court and attempting to give the impression that the petitioner has been persecuted and not properly represented.

The farmer debtor has received every consideration and benefit accorded him under Section 75 of the Bankruptcy Act, and has been fully and adequately represented at all hearings herein by counsel of his own choosing.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 209-215) contains an accurate statement of the material facts, which we repeat hereinafter in amplified form.

September 28, 1940, petitioner filed his petition as a farmer debtor under Section 75 of the Bankruptcy Act (R. 2, 14).

June 29, 1940, the first meeting of creditors was held, at which time a written proposal by the debtor to the creditors was filed. The bankrupt was present in person and represented by Robert E. Coulson. At this time the debtor was enjoined from removing or selling soil or personal property from the farm, with the exception of milk, eggs and poultry, and all funds received were ordered held subject to the order of the Referee (R. 7). No moneys were turned in to the commissioner at any time (R. 110).

July 9, 1940, a second meeting of creditors was held, at which time the petitioner was represented in person by Robert E. Coulson (R. 7). All matters were by order continued to July 25, 1940.

July 19, 1940, the petitioner filed in the District Court his amended petition under Section 75S of the Bankruptcy Act (R. 3, 25) which petition showed on its face that he was represented by J. E. Dazey and Robert E. Coulson, as his attorneys of record (R. 26).

July 25, 1940, appraisers were appointed and leave was granted to the Algonquin State Bank, Northern Illinois Finance Corporation and Hartman & Son to file petitions for reclamation and/or for sale of personal property by August 10, 1940 (R. 8). At this hearing the petitioner was again represented in person by Attorney Robert E. Coulson.

It will be noted that up to this time the petitioner had been present in open court and represented by his attorney, Robert E. Coulson, and that all of the papers filed in the cause to date showed the said petitioner to be represented by both Robert E. Coulson and J. E. Dazey, attorneys. Mr. Dazey never appeared at any time or at any hearing, although his presence was often requested by the referee (R. 109, 114, 158). Mr. Coulson had handled all of the hearings to this time, had submitted proposals in

the presence of the farmer debtor, had made a motion for the appointment of appraisers and generally looked after the interests of the farmer debtor (R. 112, 161, 162).

August 7, 1940, by leave of court first had and obtained, the petitions of Hartman & Son and Algonquin State Bank for reclamation of personal property were filed (R. 8).

August 10, 1940, after leave had and obtained (R. 8) the petition of Northern Illinois Finance Corporation for reclamation of personal property was filed. On this same day the debtor, through Attorney Robert E. Coulson, filed a petition for an order to fix the amount of rent for the encumbered real estate and personal property (R. 9, 65).

August 13, 1940, being the adjourned meeting of July 25, 1940, a motion was made by E. C. Hook and other creditors, in which the petitioner (farmer debtor) joined, that the rent of the farm and personal property be set, at which time the court entered, in behalf of E. C. Hook, the order which is hereinafter referred to as the order of August 13, 1940, and which is for the purpose of appeal known as Case No. 26 (R. 9, 72-77).

August 13, 1940, a hearing was likewise had on the petitions of Hartman & Son, Northern Illinois Finance Corporation and Algonquin State Bank, which finally resulted in orders being entered on these three petitions and which are commonly referred to hereinafter as the orders of September 7, 1940, and which represent the appeal to this court in Case No. 27 (R. 10, 77-88).

A. Two separate cases involved.

From the above it is clear that there are actually two cases involved; one, the order of August 13, 1940 which, in the Circuit Court of Appeals, was known as No. 7362 and is here known as No. 26, and the other being the orders of September 7, 1940 which, in the Circuit Court of Appeals

was known as No. 7361 and is here known as No. 27. The orders of September 7, 1940 actually involve three separate orders on the petitions of Northern Illinois Finance Corporation, Algonquin State Bank and Hartman & Son. These two separate cases are independent of each other and were consolidated in the Circuit Court of Appeals and in the present hearing for the purpose of convenience in appeal only. In order to keep the facts and matters involved distinct and clear to the court, we shall hereinafter consider each case separately, beginning with the proceedings in the Referee's office commencing August 13, 1940.

B. Order of August 13, 1940 (Case No. 26).

It will be remembered that on August 10, 1940, the petitioner (the farmer debtor below) petitioned the court to fix the amount of rent to be paid for the use of the encumbered real and personal property (R. 9, 159). This verified petition field by the farmer debtor, through his attorney, stated at its conclusion "the end of the first year of your petitioner's moratorium will be on or to-wit the 26th day of April, A. D. 1941" (R. 68).

August 13, 1940, this hearing was held and at that time, after a complete discussion of the matters and things involved pertaining to the setting of a fair rental for the use of the real and personal property, the petitioner, through his attorney, Robert E. Coulson, suggested that the rental and principal payments for the real and personal property be fixed between certain designated amounts each year, suggesting therein maximum rental figures and minimum rental figures (R. 159, 162), and further suggesting that it would be an aid to the rehabilitation of the debtor if payments required be reduced for the first year, increased in the second year with a further increase for the third year, so that the total payments made will equal the sum determined by the court as a fair annual rental

(R. 73). Upon the recommendation of the petitioner, through his counsel, and after fully considering the merits of the rental payments, the Conciliation Commissioner fixed the rentals and principal payments at a figure approximately midway between the maximum and minimum amounts suggested by petitioner's counsel (R. 72-76, 159, 162, 151-157). At this hearing the petitioner and his counsel had full opportunity to present whatever evidence they saw fit with reference to the rental value of the property (R. 163). No attempt was made by either of them to introduce any evidence whatsoever. The petitioner's attorney was presented with a copy of the order before the entry of same. Reference to the written opinion of the Conciliation Commissioner to the petition for re-hearing (R. 158-164) substantiates each and every fact hereinbefore set out. These are matters of record, about which there should be no difference of opinion and which cannot be changed by mere affidavits filed to achieve a particular end. The order of August 13, 1940 likewise fixed the period for the stay of proceedings from April 26, 1940 for a period of three years, in accordance with the petition of the farmer debtor hereinbefore set out (R. 160).

No petition for review of the order entered on August 13, 1940 was filed within ten days from the entry thereof, nor was any request for extension of time within which to file a petition for review ever made by the farmer debtor (R. 160).

September 16, 1940, thirty-four days after the entry of the order on August 13, 1940, the farmer debtor, petitioner herein, for the first time filed his petition for rehearing of the said order of August 13, 1940 and thereafter on September 23, 1940 filed his amendment thereto (R. 10, 139, 160). This petition was filed by the petitioner's present attorney, Elmer McClain, and Robert E. Coulson (R. 145). A motion to strike this petition for re-hearing was

filed by Algonquin State Bank, Northern Illinois Finance Corporation and Hartman & Son only, these creditors having no direct interest or benefit in the order of August 13, 1940 (R. 12, 148). Neither E. C. Hook nor Emil Geest, the creditors directly involved by the order of August 13, 1940 filed a motion to dismiss the petition for re-hearing, although the petitioner in his brief at page 9 would have the court believe otherwise. This is likewise a matter of record. The petition for re-hearing of the order of August 13, 1940 (R. 139) attempted to impugn the record and the opinion of the Referee (R. 158-164) by inferring that no opportunity was given to present evidence of reasonable rentals at the hearing on August 13, 1940, although the opinion of the Referee shows otherwise; also, that the period of the stay of proceedings was contrary to law, although the Referee followed the suggestion of the petitioner, as hereinbefore stated; and for the first time anywhere in the records or files in this cause stated that Robert E. Coulson was only a "water boy" and was not authorized to do anything in the cause except as authorized by Attorney Dazey and that his authorization was only to file papers prepared by Attorney Dazey and that Mr. Dazey did not know of any stipulations or agreements in the cause, having been ill of apoplexy since May 21, 1940; submitting as corroboration thereof an affidavit to the same effect signed by Mr. Dazey and Mr. Coulson.

The Conciliation Commissioner on numerous occasions requested the presence of the debtor and Attorney Dazey at the respective hearings (R. 163). Mr. Dazey's condition of health was first called to the Commissioner's attention by the petition for re-hearing and at no time were the proceedings ever continued because of Mr. Dazey's health. Mr. Dazey suffered his stroke of apoplexy May 21, 1940, more than a month before the first meeting of creditors, yet no mention thereof or complaint of lack of proper

representation or fraud practiced upon him was made by the farmer debtor until the petition for re-hearing. The allegations of the petition for re-hearing are directly contrary to the record and the facts contained in the opinion of the Referee (R. 158-164).

November 28, 1940 the Conciliation Commissioner denied the petition for re-hearing. On the same day the petitioner filed with the Conciliation Commissioner his petition for review (R. 165), which petition in effect set forth that the farmer debtor has been unable to present either evidence of facts or legal authorities or arguments, that the court erred in ordering the rental payments at the amounts which Referee had set at the suggestion of the farmer debtor, and that no evidence was taken on the subject of payments (R. 171). As hereinbefore stated, the Referee's opinion showed that a full opportunity had been accorded to the farmer debtor to present the very matters complained of in his petition for review (R. 158-164).

December 16, 1940, the District Court dismissed the petition for review on the ground that the petition for re-hearing of the order of August 13, 1940 was filed after the expiration of the time allowed by the rules of court and the statute in such case made and provided, and that the petition for re-hearing having been denied the denial thereof would not extend the time for filing a petition for review (R. 173-175).

C. The Order of September 7, 1940 (Case No. 27).

August 13, 1940 was the day set for the hearing on the petitions of Northern Illinois Finance Corporation, Hartman & Son and Algonquin State Bank (R. 9). At this hearing the farmer debtor was represented in person by Robert E. Coulson, his attorney. The petitioning creditors offered witnesses to prove that cattle of the ages covered

by their conditional sales contracts and chattel mortgages were perishable, within the meaning of Section 75S of the Bankruptcy Act. After the witnesses were sworn, but before any evidence was given by them, the farmer debtor's counsel voluntarily stated that such testimony was not necessary, that he would stipulate that the security of said three creditors was perishable, within the meaning of the Act. This oral stipulation was entered on the Commissioner's docket under date of August 13, 1940, as will appear both by reference to the Commissioner's docket (R. 9-10) and by reference to the opinion of the Commissioner, in which these facts are definitely and clearly stated (R. 109-116). The Commissioner's docket shows the following:

> "Hearing on reclamation petition and stipulations by the debtor and each of the following claimants: Hartman & Son, Northern Illinois Finance Corporation and the Algonquin State Bank, that the personal property described in the petition is perishable within the meaning of Paragraph No. 2, sub-sec. S of Section 75 of the Bankruptcy Act; it is further stipulated that the property described in the reclamation petition is not at this time claimed by debtor as exempted property. Hearing on all further motions and petitions continued to August 30, 1940 at 10 o'clock A. M. (D. S. T.)" (R. 10).

All matters were continued to August 30, 1940. The Conciliation Commissioner at said time specifically requested that Attorney Dazey be present at the hearing of August 30, 1940 (R. 100).

August 30, 1940, at the request of Mr. Coulson the hearing was continued to the 7th day of September (R. 10, 100).

September 7, 1940, a further hearing was had on the petitions of the three petitioning creditors hereinbefore

mentioned, asking for the sale of the cattle, at which time the prayer of the petitions was granted (R. 10, 100, 101, 111, 113). At this hearing the farmer debtor was present in person and represented by Attorney Robert E. Coulson and Attorney U. G. Ward, the latter being an attorney from Shelbyville, Illinois (R. 111, 113). At this hearing a full discussion was again had relative to the entry of the orders of September 7, 1940, a full opportunity was given to debtor to indicate his position before the entry of said orders, no offer of proof was made by the farmer debtor on the question of the sale of the cattle, no request for further time or for leave to put in additional proof was asked by the farmer debtor (R. 113, 114). The appointment of an auctioneer to conduct the sale as provided in the petitions was discussed with the farmer debtor and his attorneys, and as a result of said discussions William Chandler was appointed the auctioneer to conduct the sale of the cattle (R. 110). Still no mention was ever made of the inability of Mr. Dazey to be present and represent the farmer debtor, nor was any complaint at this hearing or up to this date made that the farmer debtor was not being properly represented. The orders of September 7, 1940 were then entered (R. 10, 77-78). All of the above and foregoing is fully and clearly set forth in the Conciliation Commissioner's opinion on the petition for re-hearing (R. 109-116).

September 17, 1940, the farmer debtor filed a petition for an emergency restraining order in the District Court for the Northern District of Illinois (R. 27-35) to which was appended an affidavit of Robert E. Coulson that he was the attorney of record of the farmer debtor (R. 34, 98).

September 19, 1940, an affidavit was filed by J. E. Dazey in the District Court for the purposes of the emergency petition, which for the first time set forth the fact that Mr. Dazey had been suffering since May 21, 1940, more

than a month before the first creditors' meeting of apoplexy and further saying that Robert E. Coulson was not authorized to take any of the steps taken by him in the case, but was only authorized to file papers (R. 34). The petition for emergency restraining order was denied by the Honorable William H. Holly, Judge of the District Court, on September 19, 1940 (R. 3, 41), which hearing the Conciliation Commissioner attended and testified as to his record and files. Attorney U. G. Ward had apparently been sent by Mr. Dazey to attend the hearing of September 7, 1940, but had made no mention of Mr. Dazey's inability to be present or made any complaint thereof.

September 20, 1940, Robert E. Coulson filed a motion to withdraw his appearance as attorney. On the same day, after the ten-day period of time allowed for the filing of a petition for review had expired and without a petition for an extension of time ever having been filed, the farmer debtor, through Elmer McClain, the fourth attorney to represent the farmer debtor, filed a petition for re-hearing of the orders of September 7, 1940 (R. 11, 88). This petition again set forth that Mr. Coulson was not authorized to do anything except file papers and that Mr. Dazey did not know of any stipulations or agreements in reference to the case; that as soon as he heard about the stipulations he, Mr. Dazey, procured the services of the only attorney who had had extensive practice in farmer debtor proceedings, namely, Elmer McClain; that the farmer debtor did not learn until September 19, 1940 that three orders had been entered by the Conciliation Commissioner to sell the chattel property; that he desired to present evidence on the matter, which opportunity he had not had an opportunity to do to date, to which petition Robert E. Coulson attached an affidavit stating that he had no authority except to file papers and that he did not stipulate or agree that the cows were perishable (R. 88-95). This is

directly contrary to the docket entries of the Commissioner and the opinion of the Commissioner (R. 109-116) in which it is shown that the orders of September 7, 1940 were entered in the immediate presence of the farmer debtor and two of his counsel, Robert E. Coulson and U. G. Ward, without any objection on their part.

September 23, 1940, the farmer debtor, through Elmer McClain, filed an amendment to the petition for a re-hearing, alleging that he did not see the orders of September 7, 1940 until one was shown to him on September 19, 1940 in the hearing before Judge Holly and that he did not sell two of the cows claimed by Hartman & Son, but that one became infected with mastitis, which was a dangerous and infectious disease of dairy cows, and that her usefulness as a dairy cow became so impaired that in order to save as much of her value as possible he sold her for beef (R. 95, 96).

September 26, 1940, answers to the petition for re-hearing were filed by the three creditors involved in the orders of September 7, 1940 (R. 95-107) with an affidavit thereto that the attorneys for the creditors were about to begin the interrogation of witnesses on August 13, 1940, when the stipulation was voluntarily offered by the attorney for the farmer debtor (R. 106, 107). All of the facts set forth in the answer of the three creditors is substantiated in the opinion of the Referee (R. 109-116). No motion to dismiss the petitions for re-hearing of the orders of September 7, 1940 were ever filed by any petitioning creditor and the record bears out this fact, although counsel for the petitioner at page 9 of his brief would again have the court believe otherwise and consider matters extraneous to the record.

September 30, 1940, the Conciliation Commissioner entered a draft order denying the petition for re-hearing.

October 9, 1940, the farmer debtor filed his petition for review of the three orders of September 7, 1940, no extension of time for filing a petition for review ever having been asked for. This petition for review set forth the same prejudicial matters as contained in the petition for re-hearing, which allegations are contra to the record in said cause (R. 116) and which could be entered in the petition for review only for one purpose, that of attempting to prejudice the court against the three creditors upon matters which were not only exaggerated but were not true. (See affidavit of creditors R. 192, 194 and opinion of court R. 109-116.)

December 20, 1940, the petition for review was dismissed by the Honorable William H. Holly, Judge of the District Court for the Northern District of Illinois, Eastern Division.

III.

Summary of Argument.

This case does not involve any issue of substantive right. It involves solely questions of procedure.

It resolves itself first in the question of whether Section 39C or 75S of the Bankruptcy Act governs the time within which petitions for review of orders of the Referee may be taken before the District Court. It is the contention of the respondent that Section 39C prescribes this limitation; that Section 75S refers solely to objections, exceptions and appeals as to the appraisal in such section specified.

The petitioner failed to file a petition for a rehearing within the time allowed for the filing of a petition for review, and allowed the time for review to expire before filing such petition for rehearing. He therefore cannot

re-invest himself with that right by filing a subsequent petition for rehearing which is denied.

The petition for rehearing was not filed in good faith, but solely for the purpose of appeal; therefore no extension of time may be predicated thereon.

The petitioner having induced the court to pursue a certain course, he may not later complain of any action which the Court has taken on his own suggestion or initiative.

The orders of August 13, 1940 and September 7, 1940 were consent orders, therefore, no objection, exception or appeal thereto can be taken by the consenting party and no appeal will lie therefrom. Such judgments are a record more of the contract or agreement of the petitioner than of the judicial determination of the matters therein contained by the Court itself.

IV.

ARGUMENT.

Petitioner's VII. (Page 16, Petitioner's brief)

A GENERAL NATURE OF ORDERS.

1.

Their relation to substantive rights.

Debtor in the first paragraph of his brief under this heading at page 16 would apparently lead the Court into believing that the farmer in this instance has not received

all the benefits under the Act which he has asked, or to which under the circumstances of this particular case he is entitled.

1. Debtor complains that at the time of finally fixing the rent on August 13, 1940, two years, eight months, thirteen days only remained of his three-year stay, and he set forth this matter in his petition for rehearing on the order of August 13, 1940. The Referee found this period was fixed upon motion of the farmer-debtor himself in his petition filed in this case on August 10, 1940, (for the text of that motion see debtor's petition, R. 65 and 68) defining the period to the Court in words as follows: "that your petitioner's moratorium began running on or to-wit the 26th day of April, 1940, and said first year of the moratorium will expire on or to-wit April 26, 1941".

If there is any error in the date of this moratorium it was caused by representation of debtor himself. Where a litigant or his counsel has persuaded a Court to pursue an erroneous course in any proceeding he cannot later complain of the orders entered at or on his own request.

2 and 3. Debtor now complains of the amount of the rent. The record shows the referee found (R. 162); "that at that time the debtor's counsel suggested maximum figures and minimum figures for the rental, and principal payments to be made by the debtor and, after hearing had, the order as entered fixed a rental and fixed the principal payments at amounts which were substantially less than the maximum amount suggested by the debtor's own counsel." The debtor should not be heard to complain of an order entered pursuant to his own suggestion and within the limits of his consent.

4. The argument under this point attempts to appeal to the sympathy of the Court by alleging a stripping of the farmer debtor of his personal property "under the

guise of perishable property." The creditors counter by the same type of argument.

On March 1, 1940 the order of reference to conciliation commissioner was made. On June 29, 1940, Bankrupt was examined and draft order entered that "debtor be prevented from removing soil, or personal property from farm, with exception of milk, eggs, and poultry, that he hold funds received from such sales subject to the order of Court." (See R. 7 and 158.)

No where in the record is it contended that the debtor turned over any part of the proceeds from the sale of milk, eggs and poultry, or the stipulated rent, or any "reasonable rent." The order authorizing the sale of cattle as perishable property was not made until September 7, which was ten days after the extended time for making the first rent payment.

The record does not disclose any payments by the debtor to the referee or conciliation commissioner at any time and states affirmatively that on Nov. 28, 1940, "No moneys were ever turned in to commissioner by debtor at any time" (R. 159) nor does it disclose any payment from the sale of two cows admittedly sold by him (R. 78) because of infection by disease (R. 115). Although the debtor stated under oath before the referee in this proceeding that all the cows and bull contained in the Northern Illinois Finance Corporation mortgage were still on his farm except one cow (R. 63, 85), nevertheless, the order of the referee (R. 85) found that the report of appraisers showed 8 cows missing from the security of the Northern Illinois Finance Corporation mortgage. The appraisal showed only a total of 18 cows and one bull (R. 70-71) although the mortgages covered 45 cows (R. 79, 81, 87) and the appraisal of the debtor's cattle was $1330.00 compared to $2243.80 in claims of these creditors (R. 113). This

best demonstrates that these cows in the hands of this debtor were "perishable." Thus, after a period of two years and six months after first petition was filed, Bankrupt has made no payments of any kind. Instead of being deprived of his income-producing property he has periodically disposed of parts of it without any payments to the Commissioner for almost three years to the detriment of the security of creditors. By this procedure he has not increased his ability to rehabilitate himself nor has he shown any desire to rehabilitate himself under substantive rights. He has maintained possession by legal technicalities with no substantive effort to pay his creditors.

John Hancock v. *Bartels*, 308 U. S. 180.

2.

The procedures employed.

Counsel is unable to discover the violations of "various procedures" by the "design" so apparent to the debtor in the orders of August 13, 1940, and of three orders of September 7, 1940, and so without more specific assignments of error cannot answer this point. Reference to the statement of facts contained herein (pages 1-12) justifiably shows the reason and foundation underlying the entry of the order of August 13, 1940 and the three orders of September 7, 1940.

B. DECISION OF DISTRICT COURT.

On page 18 of petitioner's brief he asserts the final orders of the District Court below are in conflict with that Court's own decisions in *In re Madonia*, 32 Fed. Sup. 165, shown as case 31, at page 25 of debtor's supplemental brief. From excerpts contained in petitioner's supple-

mental brief (page 25 of supplemental brief), it is clear leave was asked and extension granted for just cause to file a petition for review after the 10 day period expired, which brings it directly within Section 39-C of the Bankruptcy Act, which section provides:

> "The person aggrieved by an order of referee may within 10 days after the entry thereof, or within such extended time as the Court may *for good cause shown allow*, file with the referee a petition for review—"

Counsel for petitioner, being a self-designated expert in proceedings of farmer debtor (R. 90) must have known that time for filing might be extended if he could show good reason therefor. He evidently knew he could not make an ample showing in this case to persuade the Court to extend the time, so he has taken the more confusing course under the procedure now under consideration in this Court. We, therefore, maintain there is no conflict between the decision of the District Court in the *Madonia* case and in the case at bar. See *In re L. & R. Wister & Co.*, 237 Fed. 793 at 795, page 30 of this brief.

C. THE OPINION OF CIRCUIT COURT OF APPEALS.

1.

Debtor's first discussion under this heading concerns the application of Section 75-S and Section 39-C of Bankruptcy Act. In his original brief in the Circuit Court of Appeals it was his contention that Section 75-S governed on the questions of all petitions for review from referee or Conciliation Commissioner's orders to the exclusion of Section 39-C. This proposition was answered in appellee's brief in the Circuit Court of Appeals, and appellant in his reply brief thereto abandoned his original stand,

saying he had complied with Section 39-C in the instant case. Not being definitely sure which argument petitioner will pursue in this case, we will discuss both sections later. (See Discussion and Citations under Argument on Petitioner's Specifications of Error, pages 36 to 41 of this brief.)

2.

The petitions for rehearing filed herein were not sufficient to revive the right of review lost by failure to file such petition within the period prescribed by Section 39-C.

We do not agree with debtor's interpretation of that portion of the Circuit Court of Appeals' finding, set forth on page 20 of his brief.

On page 21 of his brief he sets forth four statements in the following language:

Statement 1. The petition for rehearing was granted;

Statement 2. And the old judgment was vacated;

Statement 3. And a new judgment was entered;

Statement 4. Or the petitions for rehearing were filed within the time for appeal,

which he seems to infer must all occur in a particular case before it complies with the Circuit Court of Appeals' decision.

We do not know whether counsel intentionally was trying to cloud the issue by this inference or not so we are calling the Court's attention here to the fact that the Circuit Court of Appeals mentioned the first three grounds in the conjunctive and the last or fourth ground in the disjunctive. It must appear either that the petition was filed in time, as suggested under Statement 4 above, or that the petition for rehearing was granted, as in Statement 1, the old judgment vacated as in Statement 2, and a new judgment entered as in Statement 3.

On page 22, petitioner lists his table of cases showing the applicability of these four statements to the various cases therein cited, and then draws his conclusions therefrom on page 23 of his brief. The first four cases of the table on page 22 were considered by this Court in the rendition of *Conboy* v. *First National Bank*, 203 U. S. 141; see page 142 of that opinion, and having been so considered may be dismissed without further comment herein. (The *Conboy* case is discussed hereafter on page 43 of this brief.) In the fifth case, *U. S.* v. *Ellicott*, 223 U. S. 524, the petition was filed within the time as required by Statement 4. In the sixth case, being *Citizens* v. *Opperman*, 249 U. S. 448, the petition for rehearing was filed within the time allowed even though counsel states that this point is not discussed. In *Morse* v. *United States*, 270 U. S. 151, being the seventh case, petitioner admits that Statement 4 is correct. In *Gypsy* v. *Escoe*, 275 U. S. 498, being the eighth case, Statements 1, 2 and 3 are correct. In *U. S.* v. *Seminole*, 299 U. S. 417, the petition for rehearing was filed within the time so Statement 4 is correct. In the case of *Wayne* v. *Owens-Illinois*, 300 U. S. 131, being number ten, the petition for rehearing was granted, the old judgment vacated, and a new judgment entered. In number eleven, *Carpenter* v. *Condor*, 108 Fed. 2d, 318, petitioner admits the petition was filed within the time. In *Bowman* v. *Lopereno*, 311 U. S. 262, being the twelfth and last case, the petition for rehearing was filed within the time. Thus in each and all of the cases listed in the prepared table of counsel, shown on page 22, the holdings in each case are directly in conformity with the opinion of the Circuit Court of Appeals in the instant case, and each of them follow the long established rule of law as laid down by this Court, and enunciated in *Conboy* v. *First National Bank*, *supra*.

3.

The Circuit Court's finding that the petitions for rehearing were filed for the mere purpose of extending the time for seeking review.

The next point in the Circuit Court of Appeals' opinion which is criticized by debtor is the finding therein (R. 213) that the petitions for rehearing were filed for the mere purpose of extending the time for seeking review. This is followed by reference to certain affidavits inserted in the record by petitioner in support of his petition for rehearing, and all of which were by the Conciliation Commissioner and Referee herein found to be false, not upon testimony submitted him but from his actual knowledge of what transpired at all the hearings in this matter from its inception to the date on which the order denying the petition for rehearing was entered. We will consider these points in the same order as in debtor's brief.

First

The action occurred while J. E. Dazey, alleged chief counsel, was incapacitated with apoplexy. On this the record shows and the Conciliation Commissioner finds (R. 163-164) that the condition of Dazey's health was never mentioned until brought to the Court's attention in the petition for rehearing. No continuance or extension of time was ever requested because of it, and the only information the Referee had of his condition was that contained in Mr. Dazey's affidavit, and according to that affidavit this condition occurred prior to May 21, 1940, and more than a month prior to the first meeting of creditors (R. 163-164) (R. 109-116).

SECOND

His next contention is that Mr. Coulson was not authorized to represent the petitioner substantively (self-serving affidavit of Mr. Coulson, R. 94-95), but was a water boy and did not stipulate or agree that the cows were perishable. Mr. Coulson is an attorney of law, admitted to practice in the State of Illinois, and has his offices in the same city in which the Referee held all the hearings connected with this cause, and all the hearings complained of herein, a city of approximately 35,000 inhabitants. Coulson's office is within the same block in that town and within 300 feet of the office of Mr. Givler, the Referee. Coulson signed the petition of the debtor to be adjudicated a bankrupt herein (R. 3, 26, 112). There is nothing in the record to indicate that Coulson's authority was limited, and there is nothing in the law which requires opposing counsel or opposing parties to inquire into the contract of employment between opposing counsel and his client. Coulson made motions, arguments and suggestions, attended all meetings, some in company with the farmer debtor, and some without. The Referee found (R. 163) that debtor's complaint as to adequate representation could not be from lack of number or of ability of his counsel. The statement in his affidavit that he did not make the stipulation with reference to the cows cannot be received by this Court to contradict a matter of record. The record is established on this phase (See R. 10; R. 78, paragraph 2; R. 85, paragraph 5; and R. 111) and cannot be disregarded, *Ott* v. *Thurston*, 76 F. (2nd) 368.

Debtor states he employed new counsel as soon as he heard that this property was to be sold. The fact is the farmer debtor was in Court in person when the order was entered (R. 111), and he was also represented by two

lawyers at that hearing (R. 111). He was given full opportunity to indicate his position before the order was entered, but no offer of proof was made, no request to put in further or additional proof was asked, prepared orders were submitted authorizing such sale and were signed in the presence of the debtor, all without his objection (R. 113).

On the allegation of lack of notice we further call the Court's attention to the fact that in the order on the petition of Hartman and Son (R. 78, paragraph 2) the finding of the Commissioner was:

> "That all parties hereto have had full and complete notice of the filing of said petition by said Commissioner, and of the hearing to be had hereon on this date, and that the Court had full and complete jurisdiction of the parties and the subject matter in said petition contained."

A like finding was made in the order on the petition of Northern Illinois Finance Corporation (R. 79, par. 5).

Affidavits are not admissible in any proceeding to contradict a considered order duly entered of record by a Court, and cannot be received in any proceeding for the purpose of impeachment of such records. 22 C. J. 1070-1074; *Lyons* v. *The Perin & Gaff Mfg. Co.*, 125 U. S. 698.

The affidavits filed herein were either made with a careless disregard of the fact, or very near the edge of falsehood. The Commissioner and Referee himself was conversant with the facts in this case as they transpired before him, and his finding of facts in his opinion reflects a dignified cautious restraint in his interpretation of the veracity and foundation of those affidavits. However, the record on this point speaks for itself, and the order of the Conciliation Commissioner patiently and thor-

oughly disposes of each and every one of the various items set up by farmer debtor in his desire to further extend these proceedings.

The findings of fact of the Referee or Conciliation Commissioner should not be disregarded, and should not be set aside unless error or mistake of Referee clearly appears. *Ott* v. *Thurston*, 76 Fed. (2d) 368.

FOURTH

There is nothing under this point which warrants or merits an answer.

FIFTH

Under this phase the petitioner merely attempts to rehash the points that he has already raised in Second and Third hereinabove answered. We respectfully represent that the opinion of the Referee (R. 109 to 116 and 158-164) fully answers all of the allegations contained in this phase. The affidavits of Attorney Dazey and Attorney Coulson, attached to the petition for rehearing, were countered by affidavits of the attorneys for the creditors (R. 106, 193). Mr. Coulson should not be heard or allowed to contradict by an affidavit the very things that he has consented to in open Court, and which are reflected in the Conciliation Commissioner's docket, who, as an impartial commissioner has no interest other than to arrive at a just decision based upon the evidence and material submitted.

The petitioner calls attention to the fact that three of the respondents moved to strike the petition for rehearing of the order of August 13th. As pointed out in the Statement of Facts the three creditors who moved for a dismissal of the petition to rehear the order of August 13th, as will be borne out by the record (R. 148), were creditors

who had no interest whatsoever in the order of August 13th, and were not affected thereby, and therefore said motion was of no effect as to the parties directly involved.

Sixth

Under this phase the petitioner again rehashes matters contained in phases First, Second and Third under this point, which we have already hereinabove answered.

Mr. McClain refers herein to his inability to find the entry of the orders of September 7th in the Commissioner's docket entries on September 12, 1940. Suffice it to say in answer to this allegation that the same contention was made before the Honorable Judge William H. Holly, and that at said time Mr. Givler, the Commissioner and Referee, was present in open Court and denied each and every contention of Mr. McClain as counsel for the farmer debtor, petitioner herein, and had his books in open Court showing all of the docket entries. This counsel for petitioner cannot deny. This is merely another exhibition of the effort on the part of the petitioner to misrepresent the facts as found by the Referee in his docket entries (R. 10), and his opinion (R. 113, Par. 7).

Seventh

At point III hereinafter set out we shall further discuss the point that the petitioner filed his petition for rehearing for the mere purpose of extending the time in which to appeal (page 48, *supra.*)

We call the Court's particular attention to the fact that nowhere in his petitions for rehearing has he questioned the amount of the rentals or the period of the stay provided in the order of August 13th, which are the things which this order considered. His petitions for rehearing

of the orders of September 7th, 1940 did not question the perishability of the chattel property therein directed to be sold. The sole argument and the sole contention on these petitions was the question of whether the bankrupt had had a full and complete hearing and was therefore addressed not to the merits of the orders themselves, but to the discretion of the Referee, before whom these proceedings were had, as to whether the employment of Coulson was limited, and the ability of Dazey to appear and participate in the proceedings. Under such circumstances, the Court did not entertain these petitions for rehearing on the merits of the matters in controversy, as counsel herein has so vigorously suggested without any basis in fact.

If counsel's contention, namely: that the Referee's actions herein constituted an entertainment of the petition for rehearing on the merits and revived the right of review which had been through his own actions lost, then we wonder if any order in any cause might ever become final. Would it not be possible under such a state of law, as counsel propounds, for a defeated party to come in any time after an order had been entered and time for review had expired and file a petition for rehearing regardless of how frivolous, false or groundless, without any leave being had by the Court to file such a petition, file it with the Clerk; and then call the matter up for hearing? In order to deny the petition, the Court in fairness would have to make some order in connection therewith, would have to read or consider it in some manner. If the Court then entered an order denying the petition for rehearing, would that, under this state of facts, revive a right of review which had already expired? The instant case comes within the same category.

It is our contention that the law does not contemplate such a circumvention of justice. It does not contemplate

such a revival of procedure lost through negligence or neglect of the litigant or his counsel.

> "Where there was no request for extension of time within which to file a petition for review of the decision of the Referee in Bankruptcy, a petition which was filed more than ten days after the entry of the Referee's order was not timely."
>
> *In re Brown*, 35 Fed. Supp. 619.
> *Kyser* v. *MacAdam*, 117 Fed. 2d 232, 235.

> "We do not think that the right of the Court to modify judgments * * * means that the limitation prescribed by Congress in an effort to minimize the evils of the laws' delays may be evaded by the simple expedient of filing a petition for rehearing after the right of appeal has been lost by delay."
>
> *McIntosh* v. *United States*, 70 Fed. 2d, 507.

4.

The Three Orders of September 7th, 1940, were "consent orders" and not appealable.

a. Petitioner under this point in his brief denies the three orders of September 7th are "consent orders." There can be no other conclusion on the record of these cases but that these orders are consent orders. The record shows (R. 110) that these three orders of September 7, 1942 were heard before the Referee on the 13th of August, 1940; that at that hearing the three petitioners appeared with their various witnesses to make proof that cattle of the ages covered by their Conditional Sales Contracts and Chattel Mortgages were perishable within the meaning of the Act in support of the allegations in their petitions contained (R. 111). After these witnesses were sworn, and were about to proceed with their proof, debtor's

counsel, without any solicitation and of his own volition, stipulated that he would waive the proof and would stipulate that the property in said petition mentioned was perishable within the meaning of this section (R. 111).

In the order of Hartman & Sons of September 7th (R. 78) and in the order of Northern Illinois Finance Corp. (R. 85, paragraph 5) is contained a finding of the Court that this stipulation was so made. Thus in these orders themselves there was not only a stipulation on the record itself but a finding in the orders which were that day entered. The assertion in petitioner's brief that counsel had not "consented" or "stipulated" or "agreed" is made in desperation and without foundation in fact.

The Referee before whom all these proceedings were had so found not only in the orders of Hartman & Sons and Northern Illinois Finance Corp., entered on said date (R. 78, 85), but in his subsequent order over-ruling or denying the petitions for rehearing (R. 111, 113).

b. We do not know whether counsel by his brief admits that consent orders are not appealable, we assume he does, but with the various changes and migrations of position and logic we are unable to say what position he might take in any reply brief filed herein, and for that reason we call the Court's attention to the following decisions, which hold that orders entered by consent are not appealable.

Pacific R.R. Co. of Missouri v. *Geo. E. Ketchum*, 101 U.S. 289; 25 Law Ed. 932 at 935.
U. S. v. *Babbitt*, 104 U.S. 767; 26 Law Ed. 941.
Curry v. *Curry*, 79 Fed. (2nd) 172.
Bergman v. *Rhodes*, 334 Ill. 137 at 143.
4 *C. J. Secundum* 404 Sec. 213.

The acts, stipulations and conduct of litigation by debtor's counsel of record are the acts, stipulations and conduct of the debtor himself.

Bergman v. *Rhodes*, 334 Ill. 137 at 142.
Union Central Life Ins. Co. v. *Anderson*, 291 Ill. App. 423 at 436; 10 Northeastern 2nd. 46 at 52.
American Car Co. v. *Industrial Commission*, 333 Ill. 322.

What has been said here and above with reference to the orders of September 7th may equally apply to the order of August 13, 1940 wherein the rental for the moratorium is set as shown by the record herein (R. 9). The rental therein fixed was at an amount within the range suggested by farmer debtor himself through his counsel (R. 159) as admitted by petitioner herein in his brief at page 31.

The matter of finality of consent orders is hereinafter more fully argued under point IV, page 48.

5.

The point that the District Court "had no power" to hear the petitions for review.

Petitioner complains of the conclusion reached by the Circuit Court of Appeals (R. 214) in the last paragraph of the opinion that

> "The District Court followed the statute and it had no power to do otherwise."

Section 39-C of the Bankruptcy Act provides in part as follows:

> "The person aggrieved by an order of a referee may, within ten days after the entry thereof or may within such extended time as the Court may, for cause shown allow, file with the referee a petition for review of such order * * *."

We have no argument with the ultimate conclusions reached in the decisions under this point cited by the peti-

tioner. In those cases where the petition for leave to appeal was filed after the expiration of the ten day period of limitation a petition for an extension of time within which to file a petition for review was asked for and granted before the petition for review was filed. This is not the situation in the instant case. As was said in the case of *In re Albert* CCA 2 (1941) 122 Fed. (2d) 393, a case cited by the petitioner:

> "The limitation is upon the right of a party aggrieved to obtain a review of a referee's order instead of upon the right of the Court to grant one."

Admittedly, had the petitioner in the instant case asked for an extension of time in which to file his petition for review then and in that event the Court would have had the power to grant such extension for just cause. However he made no such application for extension of time in which to file a petition for review. The petition for review having been filed after time and no extension having been granted or applied for, the District Court was right in deciding it had no jurisdiction to consider the petition for review, the petitioner not having complied with the provisions of Section 39-C of Chandler Act.

In re "L & R Wister & Co., 237 Federal 793 at 795," held:

> "It is not questioned that proceedings in bankruptcy generally are in the nature of proceedings in equity, *Bardes* v. *National Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, or that courts of bankruptcy, in order that substantial justice be done, are liberal in allowing amendments, especially to meet situations not covered by law or by rules of procedure. But it is going rather far to hold, that a court of bankruptcy, in its orderly administration of justice, will reach into its general equity powers and find a means to restore

to a person a right which is conferred upon him by statute and which he has lost by his own neglect."

* * *

"It thus appears that the statute confers the right to a review, the general order defines the procedure, and the rule of court prescribes the time within which the proceeding shall be commenced. The general order and the rule of court have the force of law. From the statute, the general order and the rule, a rule of law has developed to the effect, that unless a party objecting to an order shall himself prosecute a petition to review, setting forth the * * * errors he complains of, within the time prescribed, he may not thereafter file on his own behalf a petition to review (except upon leave of the court), nor will he be heard to complain of a referee's order on petition to review filed by another party."

To the same effect is the holding of the case of *In re David*, 33 Fed. 2d. 748, where it was held at page 749:

"Long practice under this rule and like rules of other courts has demonstrated that the time is reasonable. Should a person fail to observe the rule—which is what happened here—he will of course forfeit the advantage which, by observing it, the rule affords him. Of this advantage he cannot later avail himself by a writ of certiorari, appeal or other indirect process, for the method of reviewing an order of a referee, prescribed by General Order 27 and the supplemental rule of the District Court is exclusive. *In re Greek Mfg. Co.* (D.C.) 164 F. 211; *In re Marks* (D.C.) 171 F. 281.

"The petitions are dismissed."

D.

DISCUSSION RE AUTHORITIES ON SPECIFICATION OF ERRORS.

Under this portion of petitioner's brief he has listed fifteen alleged errors, many of which have no application whatsoever to this proceeding, many are clothed partly in fact and partly in the imagination of counsel. Whether this is done by design or not is beside the point. It, nevertheless, is confusing and if we attempted to answer each one specifically and point out the various discrepancies in each this brief would run far beyond its present limitations.

May we call the Court's attention at this time to the fact that under the law the petitioner in this proceeding before this Court can raise no question or questions other than those presented to the Circuit Court of Appeals.

Sonzinsky v. *U. S.*, 300 U. S. 506.

With the idea of reducing this brief to the answering of the limited issues as above defined we will point out the portions in our brief herein where each of the material issues herein are discussed under the subheads below.

Petitioner's Assignment of Error 1.

The matter alleged in this error was considered by the Circuit Court of Appeals, and is hereinafter discussed under our subheading I below.

Petitioner's Assignment of Error 2.

This assignment, as phrased by petitioner, was not discussed in the original proceeding. The first part of this

assignment was within the purview of the original decision but he has added to that part the following:

> "And the *entire proceeding* having *been considered* by the Conciliation Commissioner" (Petitioner's brief p. 11).

The entire proceedings were not considered by the Conciliation Commissioner. However, we will treat the material part of this assignment under subheading II hereof.

Petitioner's Assignment of Error 3.

Under this assignment he sets up the question of a *void order*. There is no finding or discussion in this proceeding of any *void order*. This is purely counsel's own conclusion. Again the material portion of this assignment of error is hereafter discussed herein under our subhead II, page 41.

Petitioner's Assignment of Error 4.

This assignment adds matters which were not discussed by the Circuit Court of Appeals by the adding of this language:

> "Regardless of when such petition for review is filed" (Petitioner's brief, page 11).

We disbelieve that the Circuit Court of Appeals held that if the petition for review had been filed within the ten days the Court would not have had jurisdiction. This assignment of error is, therefore, a distorted and untrue statement of the decision.

Petitioner's Assignment of Error 5.

There is no holding of the Circuit Court of Appeals that 39-C is a statutory limitation and not a rule of procedure.

Petitioner's Assignment of Error 6.

There is no comment in the Circuit Court of Appeals' decision on Section 2(10).

Petitioner's Assignment of Error 7.

The Circuit Court of Appeals' decision did not state that Section 39-C was or was not a limitation of Section 38.

Petitioner's Assignment of Error 8.

There is nothing in the proceeding to signify that the Conciliation Commissioner considered the whole proceeding. (See discussion at pages 25 to 27 *Supra.*)

Petitioner's Assignment of Errors 9 and 10.

These specifications are hereinafter answered by the respondents herein under our subhead II hereof.

Petitioner's Assignment of Errors 11, 12 and 14.

The question of the length of the stay in these specifications mentioned was not up for judicial determination by the Circuit Court of Appeals. It was not decided, and therefore, no error can lie.

Petitioner's Assignment of Error 13.

This assignment falls within the same scope as Errors 11 and 12. The Court was not called upon to pass upon the perishability of the property in question, nor is this Court required to pass upon this phase of the question. It is not here for determination.

Petitioner's Assignment of Error 15.

He has inserted into this assignment of error the following false premises:

"when proceedings for obtaining such review had been *perfected* by the filing of a petition for review"

and by the insertion of the wording:

"all in compliance with Section 39-C"

However, this error, as the competent parts thereof may apply to this case, are discussed herein under E subhead II.

E. RESPONDENTS' FIVE POINTS.

It is a fundamental proposition of law that the only proposition which a Court can decide in a matter are the propositions raised by the parties, and which are necessary for a proper determination of the proceeding. The following are the only points which the Circuit Court of Appeals considered, and the only propositions upon which possible errors might be assigned. These are as follows:

1. Section 39C and not Section 75S of the Bankruptcy Act governs the time for filing petitions for review of the orders of Referee in farmer debtor cases (R. 209).
2. Petitioner not having filed any petition for review within the time prescribed by Section 39C, and having lost his right to review thereunder, did not revive that right by the subsequent filing of the petitions for re-hearings of the orders of August 13, 1940 and September 7, 1940.
3. Petitions for re-hearing having been filed merely for the purpose of attempting to revive and extend this right to review, the court correctly dismissed such petitions for review.
4. Orders of September 7, 1940 are consent orders. No appeal or review by petition for review can be had thereto.
5. Order of August 13, 1940 is a consent order. No appeal or review by petition for review can be had thereto.

As we shall hereinafter point out the authorities sustain the holding of the Circuit Court of Appeals and each of the petitioner's contentions are without merit.

Some of the points hereinafter stated will no doubt be repetitious but we respectfully ask the Court to bear with us in our effort to answer the petitioner's assignments of error.

I.

Section 39C and not Section 75S of the Bankruptcy Act governs the time for filing petitions for review of the orders of Referee in farmer debtor cases.

The real issue presented to the Court in this case is whether the District Court erred in dismissing the petitions for review of the orders of the Referee entered on August 13, 1940 and September 7, 1940, for the reason that such petitions for review were not filed within the ten-day period as required under the provisions of Section 39C of the Bankruptcy Act. Especially is this true where no application for extension of this ten-day period was ever asked of or granted by this Court.

With the issues thus defined and established, we wish to quote the following extract from Section 75S of the Act itself:

> "Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: Provided, That in proceedings under this section, either party may *file objections, exceptions,* and *take* appeals within four months from the date that the referee approves the appraisal."

A reading of this section clearly indicates that this section deals solely with appraisals and does not involve any of the other procedural matters connected with this particular act. We call the Court's particular attention to the fact that nowhere in the above provision is there any reference to a review of the Referee's orders.

To further demonstrate that this section refers strictly to appraisals is the limitation that "either party may file objections, exceptions, and take appeals *within four months after* the date *the referee approved the appraisal.*"

Suppose these orders had been entered four months and one day after the Referee had approved the appraisals, would petitioner agree and would the court then hold that all right of review had been lost? This is too fallacious to warrant further discussion.

The purport of Section 75 of the Act cannot be clearly ascertained without a study of the Act itself and the general orders of the Supreme Court enacted thereon. A reading of both the Act itself and of the general orders of the United States Supreme Court make it clearly apparent that neither Congress nor the Supreme Court ever intended that Section 75 should contain all procedural limitations on matters arising under the act. In fact, in the quotation of Section 75 there is no limitation on petitions for review of referee's orders. The Supreme Court of the United States, under General Order L, Paragraph 11, appraised the incompleteness of this section when it adopted the following rule:

> "In so far as is consistent with the provisions of section 75 and of this general order, the conciliation commissioner shall have all the powers and duties of a referee in bankruptcy and the general orders in bankruptcy shall apply to proceedings under said section."

Congress itself in the act clearly signified that this section was not sufficient unto itself in procedural matters. It clearly manifested its intention that this act was to be administered in accordance with general bankruptcy procedure except as this section expressly provided to the contrary when it inserted the following language in paragraph 75 N:

> "In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner, for the purpose of forwarding same to the clerk of court."

If this leaves any doubt as to the intention of Congress and the applicability of section 39C of the Bankruptcy Act in the Court's mind, we will call the following to the Court's attention.

The record in this case shows (R. 8) that farmer debtor on July 23, 1940 prior to the entry of the orders in question, amended his petition, asked to be adjudged a bankrupt under section 75 (s) and was on said date, viz., July 23, 1940, duly adjudicated a bankrupt.

The Act itself provides (75 (s) (4)) that after such adjudication the Commissioner shall continue to act and he shall then act as a referee and not as Commissioner:

> "The conciliation commissioner, appointed under sub-section (a) of section 75 of this Act, as amended,

shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of sub-section (s) of section 75 of this Act; and continue so to act until the case has been finally disposed of."

Under the above provision of the Act, it is clear that Mr. Givler was on the date of the signing the respective orders acting as a referee; that his powers and duties, powers and the rights and liabilities of the parties to this record, whereas pointed out in Section 75 (n) on such dates the same as if farmer debtor had filed a voluntary petition in bankruptcy. Under General Order L, Givler's powers and duties were those of a referee in bankruptcy.

This being all true and section 75 carrying no inconsistent provision, section 39C of the Chandler Act must necessarily apply as to the date of the filing of petitions for review of referee's orders.

To hold that it did not and that section 75 was sufficient unto itself in this regard would be contrary to Congressional intention, and United States Supreme Court interpretation as shown above, and last but just as important to common sense, it would make all orders entered subsequent to four months of the approval of the appraisement final and impregnable to review, appeal or reconsideration.

The case of "*Sampayo* v. *Bank*, reported as *Benitez* v. *Bank of Nova Scotia*, 61 Supreme Court Reporter 953" cited by the farmer debtor states no difference or other rule. The only question presented to the court in that case was whether the definition of a farmer as set forth in section 75 (r) should govern in farmer debtor proceedings, or whether the definition of farmer appearing in Section 1, and (17) of the Chandler Act should control. The court simply held that the provision in Section 75

should apply since it is not changed by the revision, but the court clearly indicated that the very purpose of the Chandler Act was to make a comprehensive and careful revision of the bankruptcy law applied generally to all proceedings thereunder.

There is no question that the limitation provided by Section 39C for the filing of petitions for review is mandatory and has the force of law and must be complied with in order to perfect a petition for review. This is borne out clearly in the case of *In re David*, Third Circuit, 33 Fed. 2nd, 748, where it appears that at the time of such decision there was a rule of the court which required that all petitions for review of an order of a Referee in a bankruptcy case must be filed within ten days after such order; (this in substance is the same as the present Section 39C of the Bankruptcy Act); and in holding that the time specified by such rule is mandatory, the court said at page 749:

> "Long practice under this rule and like rules of other courts has demonstrated that the time is reasonable. Should a person fail to observe the rule—which is what happened here—he will of course forfeit the advantage which, by observing it, the rule affords him. Of this advantage he cannot later avail himself by a writ of certiorari, appeal or other indirect process, for the method of reviewing an order of a referee, prescribed by General Order 27 and the supplemental rule of the District Court is exclusive. *In re Greek Mfg. Co.* (D. C.) 164 F. 211; *In re Marks* (D. C.) 171 F. 281.
>
> "The petitions are dismissed."

This case, *In re David*, aforesaid, was cited with approval and upheld (contrary to petitioner's argument and contentions) in *In re Miller, Miller* v. *Hatfield*, 111 Fed. 2nd,

28, at 34. We would also like to point out that the *Miller* case last mentioned involved a farmer-debtor proceeding under Section 75.

Petitioner in his brief has cited various Sections of the Bankruptcy Act and has, in his brief, inserted isolated sentences from various Federal Courts. With his several citations as quoted, we have no argument, but he has isolated various statements of the courts which, if read with the balance of the decision, will not bear out the contention he makes, and the cases themselves, when the entire decision is read, support the contentions of the respondents herein. We will not attempt to analyze all of these decisions. We have hereinabove set forth the true and correct rule of law.

II.

Petitioner not having filed any petition for review within the time prescribed by Section 39C, and having lost his right to review thereunder, did not revive that right by the subsequent filing of the petitions for re-hearings of the orders of August 13, 1940 and September 7, 1940.

Having set forth that the order of August 13th and the orders of September 7th became final on the 10th day after their entry, the remaining proposition is, was the finality of these orders destroyed by the subsequent filing of the untimely petitions for rehearing, which were not entertained but were denied by the Court? Before going into a discussion of this matter it must be remembered that the farmer debtor failed to file a petition for review of the order of August 13, 1940, and also failed to file such a petition for review of the three orders entered on September 7th, 1940, within the ten days as required by Section 39C of the Bankruptcy Act.

Important is the fact that the farmer debtor did not apply for an extension of time in which to file his petition for review, as required by Section 39C.

It is admitted by the petitioner that the petitions for rehearing filed by him were not filed until after the expiration of the ten day period of limitation for filing a petition for review. It is further admitted by the petitioner and sustained by the record that after the denial of the respective petitions for rehearing then, for the first time, did the farmer debtor file his petitions for review. It further cannot be denied that both petitions for rehearing were by the Referee denied. For further particulars we respectfully refer the Court to the concise statement of facts herein set forth.

Upon these admitted facts the Circuit Court of Appeals, and the District Court, properly held that the petitions for rehearing did not revive or extend the time for filing petitions for review. These conclusions are sustained by the following authorities:

> "Appellant might have made his application for rehearing and had it determined within the thirty days, and still have had time to take his appeal. But he let the thirty days expire, as it did February 22, 1905, and did not file his petition until May 8, 1905. The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing.
>
> The cases cited for appellant, in which it was held that an application for a rehearing, made before the time for appeal had expired, suspended the running of the period for taking an appeal, are not applicable when that period had already expired. '*When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could*

be, the law which limits the time within which an appeal can be taken would be a dead letter.' Credit Co. v. *Arkansas C. R. Co.*, 128 U. S. 258, 261, 32 L. ed. 448, 449, 9 Sup. Ct. Rep. 107, 108." (Italics are ours.)

Conboy v. 1st National Bank, 203 U. S. 141 at 145, 51 L. Ed. 128 at 130.

The rule as announced by this Court in the *Conboy* case has never been departed from. Counsel would try to make this Court believe that this rule was changed by the decision of this Court in *Wayne United Gas Company* v. *Owens Illinois Glass Company*, 300 U. S. 131; *United States* v. *Seminole Nations*, 299 U. S. 417; *Gypsy Co.* v. *Escoe*, 275 U. S. 498; *Morse* v. *U. S.*, 270 U. S. 151, and *Bowman* v. *Lopereno*, 311 U. S. 262; but such is not the fact. Each one of these cases affirm the rule as laid down in the *Conboy* case.

So that the Court may be advised of the correct status of the present law and the gist of decisions subsequent to the *Conboy* case, we will briefly point out wherein the subsequent cases do not change the established law, but in fact affirm it.

In *United States* v. *Seminole Nations*, 299 U. S. 417, there were two sections under which petitions for rehearing might be filed. Section 350 limited the time to three months after the entry of the order under 28, U. S. C. A. 282, which rule provided that such petition might be filed any time within two years on motion on behalf of the United States. The record does not show any motion granted and the Court there held:

"On this record it is reasonably believed to be inferred, and we find, that the second motion was one filed in accordance with the rule under which application for leave was necessary and not one authorized

by statute for the filing of which permission of the Court was not needed. It is correctly stated that the three months' period did not commence to run until the Court disposed of that motion and did not expire until long after the defendant had filed its petition for this writ."

Therefore, the petition was filed in time.

Wayne v. Owens Illinois Glass Co., 300 U. S. 131.

In this case, the Court found there was sufficient reason to reopen the case and granted a new trial of the matters involved and granted the petition for rehearing, reopened the case and heard the matter on its merits and entered a new judgment. This is not the fact in the case at bar. The distinction here is clear and brings it within the exceptions mentioned by the Circuit Court of Appeals in its opinion.

Bowman v. Lopereno, 311 U. S. 262.

In this case the petition for review was filed within the time required and certified to the District Court, clearly bringing it within the distinction mentioned in the Circuit Court of Appeals' opinion in this case. In the *Bowman* case, the order complained of was the order of adjudication of bankruptcy which remained in abeyance in the District Court until October 25, 1937, at which time the order was confirmed. On November 15, being within the thirty-day appeal time, petition for rehearing of this order was asked, in which it was requested that the order of adjudication be vacated and set aside. On February 17, 1938, the petition for rehearing was heard and denied, and on March 18, 1938, the order of February 17, 1938 was appealed to the Circuit Court of Appeals. It will be

observed that the petition for review was filed within the period prescribed by law which is not the situation in the case at bar. This latter case was cited to the District Court after the District Court had made its original decision in this matter. Judge Holly reconsidered his former order and asked parties hereto to procure for him briefs filed in this Court in the *Bowman* case and after considering the briefs then filed by counsel in this Court in the *Bowman* case, reaffirmed his original order and denied the motion to reconsider. In the *Bowman* case, appellant's brief specifically set forth that they were mindful of the rule that when preparing the petition for rehearing and the filing of the appeal, that the right of appeal once lost could not be revived by petition or motion for rehearing.

Gypsy Oil Company v. Escoe, 275 U. S. 498.

In this case the petition for rehearing was filed within the period within which an appeal could be allowed and is therefore within the exceptions mentioned in the Circuit Court of Appeals' decision.

Morse v. U. S., 270 U. S. 151.

Although the petitioner contends that the case of *Morse* v. *U. S., supra,* bears out his contentions, it will be noted from an examination of that case, that a motion for new trial was filed and overruled and a motion for a second new trial was filed after the time for leave to appeal had expired, which motion for new trial was likewise denied. The Court there held that there was no suspension of the running of the time for appeal and that the suspension of the running of the period limited for the allowance of an appeal after a judgment had been entered depended upon the due and seasonable filing of the motion.

In arriving at this decision, this Court considered the following United States Supreme Court cases:

Andrews v. *Virginian*, 248 U. S. 272
Aspen v. *Billings*, 150 U. S. 31
Chicago v. *Basham*, 249 U. S. 164
Kingman v. *Western*, 170 U. S. 675
Memphis v. *Brown*, 94 U. S. (4 Otto) 715
Texas v. *Murphy*, 111 U. S. 488
United States v. *Ellicott*, 223 U. S. 524
Washington v. *Bradley*, 19 L. Ed. 894

These very cases have been cited by the petitioner as bearing out his contention.

An examination of the *Conboy* case, *supra*, will disclose that the following cases cited by the petitioner in his brief filed herein, viz:

Brockett v. *Brockett*, 2 How. 238, 11 L. ed. 251
Aspen v. *Billings*, 150 U. S. 31
Texas v. *Murphy*, 111 U. S. 488
Kingman v. *Western*, 170 U. S. 675

were also cited by the petitioner in the *Conboy* case. Yet the Supreme Court, by its decision, in effect held that these decisions did not control since the petition for rehearing had been denied. This is conclusive against the persuasiveness of these cases cited by the petitioner. In *Chapman* v. *Federal Land Bank*, 117 Fed. 2d, 321, the facts under consideration closely parallel the case at bar, and in that case that Court commented on the *Conboy* case and discussed *Morse* v. *United States*, 270 U. S. 151; *Wayne Gas Company* v. *Owen Company*, 300 U. S. 131, and arrived at the same conclusions as this Court did in the *Conboy* case above.

The proposition of law as contended by us hereunder has also been followed by the various Circuit Courts of Appeals in the following cases:

C. M. & St. P. R. R. Co. v. *Leverentz*, 19 F. 2d 915.

Chapman v. *Federal Land Bank*, 117 F. 2d 321.

McIntosh v. *U. S.*, 70 F. 2d 507.

Clark v. *Hot Springs Electric Light & Power Co.*, 76 F. 2d 918.

N. W. Public Service Co. v. *Pfeifer*, 36 F. 2d 5.

Larkin Packing Co. v. *Hinderliter*, 60 F. 2d 491.

Minz v. *Lester*, 95 F. 2d 590.

International Agriculture Corp. v. *Cary*, 240 Fed. 101.

In re David, 33 Fed. 2d 748.

In re Albert, 122 Fed. (2d) 393.

In re Miller (*Miller* v. *Hatfield*), 111 Fed. (2d) 28 at 32.

In re Wister & Co., 237 Fed. 793.

We find the correct rule hereon so clearly stated in a Circuit Court of Appeals case that while this is from an inferior Court, the language therein contained is so aptly set forth that we desire to quote therefrom the following:

> "Notwithstanding a defeated party may have lost the right to bring error, he may, under the rules, still have the right within the term to make a motion for a new trial, and to have the benefit of the court's judgment thereon. If the court shall grant the motion, a new trial will follow. *If the court shall deny the motion, there is no remedy.* The privilege of presenting a motion for a new trial and of having it heard and determined on its merits even after the time within

which to sue out a writ of error has expired, is a valuable right."

C. M. & St. P. Ry. Co. v. *Leverentz*, 19 Fed. 2d 915.

This is a common-sense rule of procedure which follows the doctrine of the *Conboy* case.

III.

Petitions for rehearing having been filed merely for the purpose of attempting to revive and extend the right to review, District Court correctly dismissed such petitions for review.

The record in this case, and especially the opinion and decisions of the Referee herein (R. 109) and (R. 158), as well as the opinion of the Circuit Court of Appeals, clearly show that they considered the petitions for a re-hearing herein were filed not with any hope of ever obtaining a re-hearing of the matter before the Referee, but solely for the purpose of reviving the time for appeal which had been expired.

This Court, in *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.* clearly indicates that it will not tolerate or permit a revival of such right under such circumstances.

> "A defeated party who applies for re-hearing and does not appeal from the judgment or decree within the time for so doing, takes the risk that he may lose his right of appeal as the application for re-hearing, if the court refuses to entertain it, does not extend the time for appeal. *Where it appears that a re-hearing has been granted only for that purpose the appeal must be dismissed.*"
>
> *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131 at 137; 25 L. Ed. 557 at 561.

IV.

Orders of September 7, 1940 are consent orders. No appeal or review thereof by petition for review can be had therefrom.

In addition to what we have heretofore said, these three orders are further impregnable to appeal for the additional reason that these orders were entered on the express consent and stipulation of the farmer debtor.

The record filed herein shows that:

Coulson was the attorney of record for the farmer debtor and, as such, attended all hearings for him before the Commissioner; he was one of the attorneys of record who signed the amended petition for the debtor (R. 26). He was present in court on July 25, 1940 and made a motion setting all matters including the petitions of these Three Creditors for hearing on August 13, 1940 (R. 8). On August 13, 1940, at the hearing on the petitions on which these orders complained of were entered, petitioners had their witnesses in court, sworn and were about to proceed with their proof, when debtor's counsel voluntarily waived such proof (R. 102-111) and without solicitation from these three appellees voluntarily entered into the following stipulation of record:

> "Hearing on Reclamation Petition and *stipulation by debtor* and each of the following claimants: Hartman and Son, Northern Illinois Finance Company and the Algonquin State Bank, that the personal property described in the petitions is perishable within the meaning of Paragraph 2, Subsection S of Section 75 of the Bankruptcy Act; it is further stipulated that the property described in the Reclamation Petition is not at this time claimed by the debtor as exempt property." (See R. 10.)

After this stipulation was made of record, said petitions and proceedings were then continued for a period of 20 days (August 13 to September 7), (R. pages 9 and 10), giving debtor and his counsel that additional time to weigh the effect of this stipulation and withdraw it or make such changes as they saw fit. Some discussion of debtor's affairs between him and his counsel must have transpired during that period because *debtor himself* and additional counsel (one U. G. Ward) appeared at the hearing of September 7th. The orders complained of were entered on that date in the presence of debtor's two lawyers and himself, and he was given "full opportunity to indicate his position before the entry of such order of sale" (R. 113). Debtor is a very intelligent man, having been at one time President of the Pure Milk Association (R. 115). He must be held accountable for what transpires in his presence, namely the entry of the orders of September 7th and the purport thereof.

These facts are conclusive that the debtor authorized the stipulation prior to the hearing of August 13 and confirmed it at and prior to the date the orders in question were signed. To hold otherwise would be a travesty on proceedings in Federal Courts.

> "It can never lie with a litigant, either by passive consent or by affirmative action, to lead a court to find a fact justified and fit to be carried into judgment and then to contend in another court that the same fact at the same time and within his own knowledge was otherwise and competent to support a contrary judgment. A consent decree within the purview of the pleading and the scope of the issues is valid and binding upon all parties consenting, open neither to direct appeal nor collateral attack. *A statement in a record on appeal that a party has consented to a decree, is equivalent to an admission that the facts exist*

on which the decree rests, and the only question open is whether that decree could be entered in that cause or on any state of facts. (*Pac. R. Co.* v. *Ketchum*, 101 U. S. 289, 296, 297; 25 L. Ed. 392; *United States* v. *Babbitt*, 104 U. S. 767, 26 L. Ed. 921; *Gauss* v. *Goldenberg*, 39 App. D. C. 597, 599.) And this principle has long been established in English courts where a decree taken by consent cannot be set aside by a bill of review, or a bill in the nature thereof except for clerical error or for something inserted but not consented to. 2 David ch. pr. 1576. Or as the Lord Chancellor put it in the time of Charles II, *there can be neither legal error nor injustice in a consent decree.* (*Webb* v. *Webb*, 3 Swanst 656.) (Italics are ours.)

Curry v. *Curry*, 79 Fed. (2d), 172.

"*A consent decree is not a judicial determination* of the rights of the parties. It *does not purport to represent the judgment of the court but merely records the agreement of the parties. A decree so entered by consent cannot be reviewed by appeal or writ of error.*" (*Paine* v. *Doughty*, 251 Ill. 396; *Galway* v. *Galway*, 231 id. 217.) (Italics are ours.)

Bergman v. *Rhodes*, 334 Ill. 137 at 143.

"It is a well settled general rule, declared in some states by express statutory provision, that a party is not aggrieved by a judgment, order, decree or ruling regularly rendered or made, on agreement or otherwise, with his express or implied consent, and therefore *he cannot appeal or sue out a writ of error to review the same*, even though there has been an attempt to reserve the right to appeal, and even though the consent order was not authorized by the pleadings.

"*Under this general rule, a party generally is estopped or waives right to appeal or bring error when*

a judgment, order or decree was entered on his motion, offer, or admission or at his request or in conformity with facts admitted by him." (Italics ours.)

4 C. J, Secundum, 404, Sec. 213.

Debtor only attended two of the several hearings had herein before the Commissioner (R. 114), and his chief counsel, Mr. Dazey never appeared (R. 109). This in spite of the fact that the Commissioner repeatedly requested their presence at hearings (R. 114). Much is made of Dazey's physical condition but as is pointed out (R. 114-115) he became ill on May 21, more than a month prior to the first hearing and more than four months prior to the entry of the orders of September 7th. If he could not care for his practice, he owed the duty not only to his client but to the court to either engage other competent counsel or to withdraw from the case entirely. His conduct in trying to ruin the career of a young attorney (Mr. Coulson) by calling him a "Water boy" and blaming him for admissions apparently made with full knowledge and acquiescence of debtor, are, to say the least, not commendable to such learned counsel as Mr. Dazey is portrayed to be.

The acts, stipulations and conduct of litigation by debtor's counsel of record are the acts, stipulations, and conduct of debtor himself.

"A solicitor may certainly consent to whatever his client authorizes, and in this case it distinctly appears of record that the Company assented thereto, through its solicitors."

Pacific R. R. Co. v. *Ketchum*, 101 U. S. 289 at 296; 25 L. Ed. 932 at 935.

U. S. v. *Babbitt*, 104 U. S. 767; 26 L. Ed. 921.

It is certain that this stipulation was authorized because the order, prior to entry thereof and after the stipu-

lation, was discussed in debtor's presence and no question raised, and the record so shows.

"*Where an attorney is the counsel of record for a client, his agreement* and the conduct and management of the litigation *must be considered as the agreement of his client*, and *if any of his acts are without sufficient authority as between him and his client, the remedy of the client is against his counsel.*" (Italics are ours.)

Bergman v. *Rhodes*, 334 Ill. 137 at 142.

"When one puts his case in the hands of an attorney, it is a reasonable presumption that the authority conferred includes such actions as the attorney, in his superior knowledge of the law, may decide to be legal, proper, or necessary in the prosecution of the suit, and consequently whatever adverse proceedings may be taken by the attorney are to be considered binding upon the client. Attorneys may waive objections with respect to pleading, or fail to file proper pleas, make admissions of fact, and of necessity make disposition of many things that arise in and about the trial of cases."

Union Central Life Insurance Co. v. *Anderson*, 291 Ill. App. 423 at 36; 10 N. E. (2d) 46 at 52.

To the same effect see:

Clemens v. *Gregg*, (Cal.) 167 Pac. 294 at 297.

American Car Co. v. *Industrial Commission*, 335 Ill. 322.

V.

Order of August 13, 1940 is a consent order. No appeal or review by petition for review can be had thereunder.

What has been hereinabove argued and set forth as to the order of September 7, 1940, equally applies to the order of August 13, 1940. It will be borne in mind by the Court that the rentals provided for in this order were set within the range of amounts suggested by the debtor (R. 162 par. 6). The moratorium therein suggested was fixed at the dates suggested by the debtor (R. 68).

F. CONCLUSION.

Debtor lost his right to have the orders in question reviewed by the District Court on the tenth day following the entry of same, he having filed no petition for review thereof. This right of review was not revived by the filing of the alleged petitions for rehearing before the Referee herein. No request having been made for an extension of time as provided in Section 39-C or granted by the Court, the District Court correctly dismissed the petitions for review filed by the debtor therein, and the Circuit Court of Appeals correctly sustained such action of the District Court in so doing.

The orders of September 7 are consent orders and no appeal or review thereof is permissible.

The order of August 13 was entered at the request and in conformity with suggestions of the debtor, and they thereby also become consent orders and are not reviewable or appealable.

The decision of the District Court and of the Circuit Court of Appeals in this case is in conformity with the

long-established and recently confirmed rules of law as laid down by this court and their action herein should be sustained.

In conclusion may we again call the Court's attention to the fact that this appeal involves two separate cases, each of which is independent of the other and both of which have been consolidated for the purposes of appeal only.

Respectfully submitted,

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